United Nations A/HRC/28/NGO/32

General Assembly

Distr.: General
19 February 2015

English only

Human Rights Council
Twenty-eighth session
Agenda item 3
Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Written statement* submitted by the Human Rights Advocates Inc., a non-governmental organization in special consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[15 February 2015]

* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

GE.15-02927 (E)
1502927

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Environmental Harm Knows No Boundaries: Water Pollution, Both Here and There

I. Introduction

"Thousands have lived without love, but not one without water."[1] The simple concept that water is indispensable for human existence has become an undeniable part of international human rights discussions. Thus, given the international community's recognition that environmental degradation as a whole adversely impacts the right to water, food, life, and health,[2] it is necessary to include global water pollution of lakes, rivers, and oceans within that broader discussion.

In 2010 the General Assembly adopted a resolution recognizing that the right to safe drinking water and sanitation is a "human right that is essential for the full enjoyment of…all human rights."[3] Further, in 2011 the Human Rights Council affirmed that "the human right to safe drinking water and sanitation is derived from the right to an adequate standard of living and inextricably related to the right to the highest attainable standard of…health, as well as the right to life and human dignity."[4]

The international community's emphasis on the integral role that water occupies in the realization of human rights is outspoken and clear. However, the scope of State duties regarding prevention of water pollution necessitates additional clarification. The intent of this report is to highlight the extraterritorial obligations implicated in the context of *transboundary waters* generally, as well as the duties that arise when harm is inflicted in *extraterritorial waters*.

II. The World's Transboundary and Extraterritorial Waters

The world contains 263 transboundary lake and river basins, which in the aggregate cover nearly half of the Earth's land surface.[5] Such basins include territory of 145 nations, and an additional 21 nations lie entirely within areas with a shared water source.[6] Moreover, the ubiquitous presence of transnational corporations gives way to extraterritorial activities which affect waters a long way from the country of

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[1] W.H. Auden, *First Things First* (1956).
[2] *Report of the Independent Expert on Human Rights and the Environment*, A/HRC/22/43 at para. 34 (2012).
[3] *The human right to water and sanitation*, A/RES/64/292 at para. 1 (2010).
[4] *The human right to safe drinking water and sanitation*, A/HRC/RES/18/1 at para. 1 (2011).
[5] UN Water, *Transboundary Waters: Sharing Benefits, Sharing Responsibilities* (2008).
[6] UN Department of Economic and Social Affairs, *Transboundary waters*, http://www.un.org/waterforlifedecade/transboundary_waters.shtml (24 October 2014).

origin. In order to avoid globally undermining human rights, it is important to discuss the international obligations that flow from such a complex network of the world's waterways.

a. Pollution of a Transboundary Water Source: The Danube River

Of the world's vast number of water bodies classified as transboundary, none is more expansive than the Danube River. Running through Eastern and Central Europe, an astonishing 19 countries share the Danube River Basin, which translates to over 80 million people.[7] Although pollution to this notorious waterway is far from new, a notable example is the 2010 collapse of a Hungarian dam containing toxic waste, including arsenic and mercury.[8] The collapse released 184 million gallons of contaminated mud into the Marcal River, killing at least 8 people.[9] The ecological disaster reached new proportions as the spill fed into the Danube River, which serves as a water source for millions of people.[10] Thus, the event highlighted the lack of oversight by the Hungarian government in dam-building standards as a whole, as well as the severe impact that such standards have on the right to water.[11]

b. Pollution of Extraterritorial Waters: The Gulf of Mexico

On April 20, 2010, the explosion of the Deepwater Horizon oil rig, located in the Gulf of Mexico, lead to 87 days of oil gushing from the sea floor.[12] In addition to killing 11 workers, the calamity caused 170 million gallons of oil to spill, which gravely impacted the habitat and wildlife of the region, as well as the livelihood of thousands of people.[13]

Luckily for those harmed (primarily U.S. citizens), BP has offices in the United States, which gave victims a jurisdictional basis to file thousands of lawsuits in U.S. courts against BP and affiliated

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[7] International Commission for the Protection of the Danube River, *Countries of the Danube River Basin*, http://www.icpdr.org/main/danube-basin/countries-danube-river-basin.

[8] National Geographic, *Toxic mud spill latest insult to Polluted Danube River*, http://news.nationalgeographic.com/news/2010/10/101012-toxic-spill-hungary-danube-river-water/ (12 October 2014).

[9] Id.

[10] Id.

[11] Id.

[12] New York Times, *Gulf Spill is the Largest of Its Kind*, http://www.nytimes.com/2010/08/03/us/03spill.html?_r=2&fta=y& (2 Aug. 2010).

[13] NRDC, *Disaster in the Gulf*, http://www.nrdc.org/energy/gulfspill/.

organizations.[14] The company has inevitably paid billions in damages relating to activities leading up to the spill, as well as their failure to mitigate harm thereafter.[15]

Despite BP's overwhelming liability, an issue remains as to whether Britain, the State whose laws govern the company, has obligations to both regulate BP's activity as well as hold them accountable for their human rights violations abroad. The inquiry into Britain's obligations begs the following question: What would have happened if the company *had not* had offices in the U.S., thereby shielding the opportunity of victims to seek recourse in U.S. courts? The answer is proposed in the following section.

III. Extraterritorial Obligations (ETOs) implicated in international water pollution

Given the extensive reach of water, and the globalized presence of transnational corporations, it follows that States should have a duty to prevent against extraterritorial human rights violations implicated by water pollution. However, as recognized by the Independent Expert on human rights and the environment, "[T]he application of human rights obligations to transboundary environmental harm is not always clear."[16] He cites jurisdictional disputes as one barrier for consensus, as well as the failure of human rights bodies to address ETOs relating to environmental harm.[17]

Despite these recognitions, the Independent Expert argues that the legitimacy of ETOs relating to both transboundary and extraterritorial waters is grounded in several human rights sources. Notably, the Committee on Economic, Social and Cultural Rights in General Comment 15 interpreted the ICESCR as requiring parties to "refrain from actions that interfere, *directly or indirectly*, with the enjoyment of the right to water in *other countries*."[18] Additionally, then-Special Rapporteur on the human right to safe drinking water and sanitation recently recognized that the Maastricht Principles on ETOs require States to "desist from acts…that create a real risk of nullifying or impairing the enjoyment of economic, social, and cultural rights extraterritorially."[19] Moreover, she argued that this duty translates directly into State obligation to avoid transboundary water contamination, as well as regulate non-State actors in their

[14] Bloomberg, *Worst Case BP Ruling on Gulf Spill Means Billions More in Penalties*, http://www.bloomberg.com/news/2014-09-04/bp-found-grossly-negligent-in-2010-gulf-of-mexico-spill.html (4 Sept. 2014).
[15] Id.
[16] *Report of the Independent Expert*, A/HRC/25/53 at para. 63 (2013).
[17] Id.
[18] General Comment 15, E/C.12/2002/11 at para. 31 (2003).
[19] *Report of the Special Rapporteur*, A/68/264 at para. 46 (2013).

extraterritorial activities.[20] Such obligations directly correspond to the Danube River and BP oil spill, respectively.

Finally, international case law supports the notion that States have obligations to regulate entities that are within their jurisdiction or control, which is applicable to both transboundary and extraterritorial violations. The 1941 *Trail Smelter Arbitration*, brought under the Boundary Waters Treaty of 1909,[21] stands for the principle that conduct occurring in one State that causes environmental harm in another imputes liability to the former for damages flowing from the conduct.[22] The tribunal held that Canada was liable for agricultural harms in the U.S. caused by sulphur dioxide fumes emanating from a smelter plant within their jurisdiction.[23]

Applying this principle to the BP spill suggests that Britain could have been liable for BP's extraterritorial actions that interfered with enjoyment of human rights to health, lives and livelihoods. In addition, Britain had a duty to ensure access to justice for victims of BP's conduct.[24] A similar conclusion should be reached in the context of the Danube spill that Hungary must regulate dams within its jurisdiction to avoid causing transboundary harm.

IV. Recommendations

a. Human Rights Advocates (HRA) urges the Council to:

1. Recognize the findings of the Independent Expert on human rights and the environment and the Special Rapporteur on the right to safe drinking water and sanitation regarding States'extraterritorial obligations to protect against and remedy violations flowing from state and non-state actors, and

[20] Id.
[21] IJC, *Boundary Waters Treaty*, http://www.ijc.org/en_/BWT (11 Jan. 1909).
[22] C. Chatterjee and A. Lefcovitch, *The Gulf of Mexico oil disaster*, Amicus Curiae, Issue 84, 17-24 (2010).
[23] Id. at 23.
[24] Id. It is important to note the distinction that in *Trail Smelter*, the harm flowed directly from activities within Canada's jurisdiction, whereas BP's conduct did not "originate" in Britain. However, *Trail Smelter* calls for accountability of States pertaining to activities within their domain or control, which *is* applicable to BP.

2. Request the Working Group on Business to discuss at their November 2015 forum best State practices of holding private actors accountable for extraterritorial activities that negatively impact the environment and human rights, particularly regarding transboundary water pollution.

b. HRA urges States to:

1. Provide venues for redress of environmental harms from extraterritorial activities by State and non-state actors.

2. Adopt a global perspective to tackling water pollution by ensurin that harm is addressed not only within State territory, but also extraterritorially and within areas where transboundary waters flow.